Filed 6/7/17 P. v. Flowers CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HILDEBRANDT FLOWERS, Defendant and Appellant.	B266974 (Los Angeles County Super. Ct. No. A761012)

APPEAL from an order of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

In 1986, defendant Hildebrandt Flowers suffered a judgment of conviction following his entry of a guilty plea. Nearly two decades later, Flowers filed a motion to vacate the judgment and withdraw his plea on the ground the trial court failed to advise him of the immigration consequences of his plea, as required by Penal Code section 1016.5.[1] The court denied his motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Flowers's Plea*

On January 1, 1985, when Flowers was 20 years old, he attempted to rob three victims at gunpoint. Before he could complete the robbery, however, the police arrived on the scene. Flowers fled but was subsequently apprehended.

Flowers was charged with three counts of attempted robbery during which he personally used a firearm (§§ 211, 664, 12022.5) and two counts of assault with a firearm (§§ 245, subd. (a)(2), 12022.5).

On April 9, 1985, pursuant to a plea agreement, Flowers pled guilty to three counts of attempted robbery and admitted three firearm use enhancements pursuant to section 12022, subdivision (b). He was sentenced to two years on one of the attempted robbery counts and two years for one firearm use enhancement; the sentence on the other counts was stayed.

The minute order for the hearing at which Flowers pled guilty indicates that the trial judge was the Honorable Ronald S.

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

W. Lew, and the prosecutor was Jacqueline Connor. Box 42 on the minute order was checked, indicating: "Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self-incrimination. Defendant advised of possible effects of plea on any alien or citizenship/probation or parole status."

B. *Flowers's Section 1016.5 Motion*

On November 21, 2014, Flowers filed a motion to vacate the judgment and withdraw his guilty plea pursuant to section 1016.5. Flowers claimed in the motion that the record did not show that he "received the statutory warning of the immigration consequences of his guilty plea." He also claimed that "the plea now subjects him to deportation, to exclusion from the United States (if he were to attempt to return after any departure), and to denial of naturalization if he were able either to avoid deportation or to return after deportation."

In support of his motion, Flowers submitted a declaration stating that he was born in British Honduras—now Belize—and came to the United States with his parents when he was a small boy and "lived as if I were a native of the United States." Flowers stated in the declaration that when he was charged with the attempted armed robberies in 1985, he did not have any adult convictions. Regarding the pleas and its consequences, Flowers stated, "I entered my plea without any advice or any thought about immigration consequences. I never had any threat of deportation from the United States until I was convicted of driving under the influence of alcohol in January 2013. Since then Immigration and Customs Enforcement has detained me twice for removal (deportation) proceedings in immigration court.

It was not until my detention in 2013 that I began to face the immigration consequences of this plea. [¶] . . . If I had known that this first conviction could be the basis for deportation and exclusion from the United States, I believe that I would have sought a different plea agreement, or that I might have gone to trial."[2]

In opposition to Flowers's motion, the People submitted the declaration of retired Superior Court Judge Jacqueline Connor. Before Judge Connor took the bench, she was a prosecutor. She was the prosecutor in the case that led to Flowers's 1985 guilty plea and conviction. Judge Connor stated in her declaration, "While I do not recall Mr. Flowers personally, it was my standard and consistent practice to advise defendants of the immigration consequences of pleading guilty or no contest, as required by . . . section 1016.5. [¶] . . . At the time, I was the assigned calendar deputy in Department 116, Judge Ronald Lew's court. Judge Lew never took any pleas. I was responsible for and would personally advise all defendants of their rights. I always included the language regarding immigration consequences in pleas of guilty or nolo contendere. [¶] . . . It was my custom and practice as part of every plea to specifically advise every defendant that 'if you are not a citizen of the United States, your conviction in this case may have the consequence of deportation, exclusion from the United States and/or denial of naturalization.'"

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[2] As an attachment to his declaration, Flowers submitted paperwork from the United States Department of Homeland Security regarding the deportation proceedings against him. He also submitted testimonials from people and organizations attesting to his good character.

The transcript of the proceedings at which Flowers entered his guilty plea apparently was destroyed in the regular course of superior court document retention policies. The court reporter who was responsible for preparing the transcript stated, "per court procedure 30 years ago, all my paper notes were given to [Los Angeles] Superior Court for maintenance and storage. Upon being contacted by the reporter's office, I inquired about the status of my notes from 1985 and was informed that court reporter notes are not kept over ten years. I was not on a computer system for court reporters 30 years ago so the only stenographic notes I had for these proceedings were the paper notes I delivered to [Los Angeles] Superior Court for storage."

C. *The Trial Court's Disposition*

In advance of the hearing on Flowers's motion, the trial court ordered a microfilm copy of Flowers's case file. At the hearing, the court indicated it had read the papers Flowers submitted as well as Judge Connor's declaration. Flowers's counsel stated that he would like the opportunity to question Judge Connor. The court pointed out that Judge Connor stated that she had no independent recollection of Flowers or this case and asked defense counsel what he would ask her. Counsel said he "would challenge the precision of her recollection of what she said 30 years ago." The court responded that Judge Connor could not "be specific. She's only saying 'This is my standard practice.'"

While the court was not unsympathetic to Flowers's situation, it stated, "I just can't turn my back on that declaration. If Judge Connor was here under oath, this is what she would say, and I would have to accept that, and I would say that that would meet the burden of proof of preponderance of the evidence that

that was the advisement given, the advisement was sufficient, and, therefore, without anything more, I would have to deny your request to vacate and set aside this plea." Flowers's counsel requested additional time to formulate another theory on which relief could be granted. The trial court agreed to continue the hearing and stated that its inclination to accept Judge Connor's declaration at face value would be a tentative ruling.

At the continued hearing, Flowers's counsel raised no new theory. He stated, however, that he had corresponded with Judge Connor about her declaration, and that based on that correspondence, "there's some doubt whether she said the right thing" regarding the immigration consequences of Flowers's plea. The court disagreed, stating that it had no doubt that Judge Connor gave the proper section 1016.5 advisement to Flowers at the time of his plea. The court further stated that Flowers had not presented any evidence indicating that the court's tentative ruling was in error and should be changed. The court therefore denied Flowers's motion.

DISCUSSION

Section 1016.5 was enacted in 1977. It provides that "[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization

pursuant to the laws of the United States." (*Id.*, subd. (a).) Section 1016.5 further provides a court may vacate a judgment and permit a defendant to withdraw a plea if the defendant was not advised of the immigration consequences of the plea. (*Id.*, subd. (c).)

In order "[t]o prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]" (*People v. Totari* (2002) 28 Cal.4th 876, 884; accord, *People v. Arriaga* (2014) 58 Cal.4th 950, 957-958 (*Arriaga*).) We review the trial court's ruling on a motion to vacate under the abuse of discretion standard. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

Subdivision (b) of section 1016.5 provides that "[a]bsent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." Flowers contends the presumption applies here, and the People failed to overcome that presumption by showing that he was properly advised. In support of his contention, he relies on *Arriaga*, *supra*, 58 Cal.4th 950. *Arriaga* does not, however, support Flowers's contention; it defeats it.

In *Arriaga*, the defendant pled guilty to possession of a sawed-off shotgun in 1986; the reporter's transcript and notes from the plea hearing were destroyed after 10 years. "The minute order showed a checked box next to this statement: 'Defendant advised of possible effects of plea on any alien or

citizenship/probation or parole status.' But the minute order was silent on advisement of the three possible immigration consequences resulting from a plea of guilty or no contest: deportation, exclusion from the United States, and denial of naturalization. . . . [T]he prosecution conceded that the limited record of the 1986 plea hearing gave rise to a rebuttable presumption, imposed by [section 1016.5, subdivision (b)], that the requisite [immigration] advisements were not given. [Citation.]" (*Arriaga*, *supra*, 58 Cal.4th at p. 956.)

To rebut the presumption, the People presented the testimony of the prosecutor at the 1986 plea hearing, who stated "that in plea matters he, rather than the trial judge, would advise defendants of the immigration consequences of pleading guilty or no contest. Although [the former prosecutor] did not remember this particular defendant, he said he always gave this advisement: 'There are a number of consequences to your plea. One of those consequences is you may be deported from the country, that is, required to leave the country, after you are convicted of this offense. You may be denied readmission to the United States after you enter your plea. And if you apply for citizenship, that application may be denied.'" (*Arriaga*, *supra*, 58 Cal.4th at p. 956.) Based on this testimony, the trial court found "that the prosecution had proved, by a preponderance of the evidence, that defendant was told of the immigration consequences of his guilty plea." (*Ibid.*) The Court of Appeal affirmed.

The Supreme Court affirmed as well. It held that when the record does not show that the section 1016.5 advisement regarding the immigration consequences of a plea was given, thereby triggering the presumption that the advisement was not

given, the People can overcome that presumption by "proving it is more likely than not that the defendant *was* properly advised. (*Arriaga*, *supra,* 58 Cal.4th at p. 963.) Applying that standard, the court concluded that "the trial court reasonably found that the prosecution *did* carry its burden of proving that defendant received the proper advisements. . . . The prosecutor who had been assigned to the 1986 hearing testified . . . that, although he did not recall defendant specifically, it was his practice to always advise defendants of the immigration consequences of pleading guilty or no contest, as required by section 1016.5. The prosecutor recited in detail his oft-given advisement of immigration consequences [citation]. This testimony, coupled with the checked box on the minute order of the 1986 plea hearing, which indicated, 'Defendant advised of possible effects of plea on any alien or citizenship/probation or parole status,' support[ed] the trial court's finding that defendant was told of the immigration consequences of pleading guilty." (*Arriaga*, *supra*, 58 Cal.4th at pp. 963-964.)

Arriaga is almost on all fours with Flowers's case. As in *Arriaga*, the relevant box in the minute order from Flowers's 1985 plea proceedings was checked to indicate that Flowers was advised of the possible immigration consequences of his guilty plea. And while Judge Connor did not testify at the hearing on Flowers's motion, the statement in her declaration that it was her practice to give the immigration advisement to all defendants who entered pleas of guilty or no contest in the courtroom in which she was the calendar deputy at the time of Flowers's plea was essentially the same as the testimony of the prosecutor in *Arriaga*. Thus, under *Arriaga*, the evidence supports the trial

court's finding that Flowers was advised of the immigration consequences of his plea.[3]

Flowers asserts that the statement in Judge Connor's declaration that "[i]t was my custom and practice as part of every plea to specifically advise every defendant that 'if you are not a citizen of the United States, your conviction in this case may have the consequence of deportation, exclusion from the United States and/or denial of naturalization'" lacked sufficient foundation to be admissible as evidence of habit or custom under Evidence Code section 1105.[4] We disagree. *Arriaga* and other

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[3] The court in *Arriaga* noted that "[t]here will be circumstances . . . under which the trial court may properly conclude that the prosecution has not rebutted the nonadvisement presumption. For instance, both the original prosecutor and the trial judge may be unavailable to testify; their testimony about what occurred at the plea hearing may prove less persuasive than the defendant's testimony; or the minute order for the plea hearing, by the absence of any notation that the defendant was advised, may strongly support an inference that advisements were *not* given [citation]." (*Arriaga*, *supra*, 58 Cal.4th at p. 963.) Those circumstances were not present in *Arriaga* itself, and they are not present here.

[4] In the trial court, Flowers objected to Judge Connor's declaration on the ground that it parroted the "generic language" of section 1016.5 and thus could not have reflected her specific recollection of what she actually said in connection with Flowers's plea. This objection was sufficient to allow us to consider on appeal Flowers's challenge to the foundation of Judge Connor's declaration. (See *People v. Valdez* (2012) 55 Cal.4th 82, 130 [objection sufficient if it fairly informs the court and the proponent of the evidence """of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the

cases firmly establish that testimony that certain procedures were always followed in a courtroom can suffice to prove habit or custom. (*Arriaga*, *supra*, 58 Cal.4th at pp. 963-964; see also *People v. Pride* (1992) 3 Cal.4th 195, 256 [attorneys "testified that all defendants who pled guilty before [the trial judge] were fully advised by their counsel of all constitutional rights and potential sentencing consequences, and that the judge extracted a personal waiver on each issue from every accused" and "never deviated from this procedure"]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 955-956 [judge "testified that his practice was to personally advise the defendant of immigration consequences in each case"].)[5]

In sum, the trial court did not abuse its discretion in concluding that Flowers was properly advised of the immigration consequences of his plea and that therefore his section 1016.5 motion should be denied.[6]

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court can make a fully informed ruling""""].) We thus reject the People's contention that Flowers's claim of lack of foundation for the declaration was not preserved for appeal because he failed to object to the declaration on that specific ground in the trial court.

[5] Flowers's reliance on *People v. Hughes* (2002) 27 Cal.4th 287, to support his challenge to the foundation of Judge Connor's declaration is misplaced. In *Hughes*, testimony that the victim *"on occasions*" left the top half of her Dutch door open when she cleaned her apartment was insufficient to establish that she had a custom or habit of doing so. (*Hughes*, *supra*, at p. 337, italics added) Here, by contrast, Judge Connor stated that she "*always* included the language regarding immigration consequences in pleas of guilty or nolo contendere." (Italics added.)

[6] Because the trial court did not abuse its discretion in determining that Flowers was properly advised of the

DISPOSITION

The order is affirmed.

SMALL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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immigration consequences of his plea, we do not address his claim that he would not have pled guilty had he been properly advised.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.